Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. CG 02-278
Telephone Consumer Protection Act of 1991	)	
	)	

REPLY COMMENTS OF ACA INTERNATIONAL TO THE PETITION FOR RECONSIDERATION FILED BY GREAT LAKES HIGHER EDUCATION CORP., NAVIENT CORP., NELNET INC., PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, AND THE STUDENT LOAN SERVICING ALLIANCE

ACA International ("ACA")[1] respectfully submits these reply comments in support of the Petition for Reconsideration[2] ("Petition") filed by Great Lakes Higher Education Corp., Navient Corp., Nelnet, Inc., Pennsylvania Higher Education Assistance Agency, and the Student Loan Servicing Alliance (collectively, "Petitioners") of the *Report and Order* ("*Order*") adopted by the Federal Communications Commission ("Commission") on August 11, 2016 in the above-captioned proceeding.[3]

ACA agrees with Petitioners, along with several other filers who submitted comments supporting the Petition, that the Commission's rules to implement Section 301 of the Bipartisan

[1] ACA International is the largest trade association for the debt collection industry. ACA's diverse membership represents approximately 3,500 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates, who employ more than 230,000 employees worldwide.

[2] Petition for Reconsideration of Great Lakes Higher Education Corp.; Navient Corp.; Nelnet, Inc.; Pennsylvania Higher Assistance Agency; and the Student Loan Servicing Alliance of the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, (Dec. 16, 2016) ("Petition").

[3] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 31 FCC Rcd 9074 (Aug. 11, 2016); 81 Fed. Reg. 80594 (Nov. 16, 2016) ("*Order*").

Budget Act of 2015 ("Section 301" or "exemption")[4] are contrary to congressional intent, unsupported by the plain language of the statute, and disconnected from the clear record in the proceeding. For these reasons, ACA respectfully urges the Commission to reconsider the rules and revise them accordingly.

As far as the comments filed in opposition to the Petition for Reconsideration, these comments rely on cherry-picked examples, conclusory statements, and extraneous information in an effort to convince the Commission that it was correct to substitute its own preferred policy outcome for the express will of Congress when adopting the rules. However, no amount of distraction and fear mongering can justify the Commission's decision to eviscerate both the letter and spirit of the Section 301 exemption through the series of draconian limitations it adopted in the *Order*.

I. THE FINAL RULES ARE NOT SUPPORTED BY THE STATUTORY LANGUAGE, CONGRESSIONAL INTENT, OR THE RECORD.

Section 301 of the Bipartisan Budget Act exempts calls "made solely to collect a debt owed to or guaranteed by the United States" from the prior express consent requirement of the Telephone Consumer Protection Act ("TCPA").[5] Congress enacted this limited exemption so that one category of debt collectors – those who collect debt owed to or guaranteed by the United States – would have a clear pathway to use modern calling technology to contact consumers on their mobile telephones in order to increase the recovery of government debt.

Despite this clear intent and the express words of Section 301, the Commission improperly used its rulemaking authority to encumber the exemption with so many limitations that it has almost no practical impact in fostering the communication between consumers and debt collectors that is needed to promote the repayment of federal government debt, or in reducing liability for

[4] Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 ("Budget Act").

[5] 47 U.S.C. § 227; *see also* 47 C.F.R. § 64.1200.

government debt collectors who contact consumers on their mobile telephones using modern calling technology. To remedy this, ACA supports the following revisions to the rules:

A. The three-call-attempts-per-thirty-days frequency limitation should be increased and should only include connected calls.

In the rules, the Commission limits the number of covered calls under the exemption to three attempts per thirty days. As the Petitioners have pointed out, this low frequency restriction "lacks a rational basis and seems drawn from thin air."[6] While the Commission received substantial comments from a variety of sources – including other federal agencies[7] – describing the importance of live communication and the large number of attempts that is often required before a live contact is made, the Commission seemingly ignored such data in choosing the three-call-per-month limitation. Instead, the Commission justified their choice by simply stating it had to "engage in an exercise of line-drawing" because there was "no consensus."[8]

However, it goes without saying that when implementing rules, any necessary line drawing must be confined to giving effect to the statute and will of Congress. In this case, by preventing a government debt collector to call a consumer more than three times within any thirty-day period – which the record shows is often necessary to establish contact – the *Order* deprives the exemption of its intended utility.

In reconsidering the *Order*, while ACA continues to believe that the Commission should abstain from imposing a specific frequency limitation under Section 301 until the Consumer Financial Protection Bureau ("CFPB") moves forward with its plan to promulgate rules for the debt collection

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[6] Petition at 4.

[7] *See, e.g.*, Letter from Ted Mitchell, Undersecretary, Department of Education, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 4 (July 11, 2016).

[8] *Order* at ¶ 26.

industry,[9] to the extent the Commission disagrees then ACA strongly urges the Commission to at least increase the far too low frequency limitation adopted in the rules.

In addition, it is crucial that any call frequency standard applies only to connected calls and not merely call attempts. As the record amply demonstrates, because it takes multiple attempts to reach a consumer about a debt, unduly limiting the ability of debt collectors to make repeated call attempts to establish live contact hinders the successful recovery of debt and deprives consumers of important account information.

B. The exemption should cover all calls whose purpose is "solely to collect a debt," including inadvertent calls to reassigned numbers and accidental calls to the wrong party, if made in good faith.

Congress's intent in passing Section 301 was to exempt federal government debt collection calls from the TCPA's prior express consent requirement. If a consumer already provided a creditor with a cellular telephone number then by the Commission's own rulings, that action constitutes prior express consent and there would be no need for an exemption.[10] The only way the exemption provided by Congress would be meaningful is if it applied to calls when no prior express consent had already been given by a consumer to call a particular number.

Despite this, the Commission nevertheless decided to apply the misguided one-call attempt safe harbor established in the *July 2015 TCPA Ruling and Order* to the exemption. This substantial limitation opens up callers to massive liability exposure despite Congress's very clear intent to exempt government debt collection calls from the TCPA's prior express consent requirement. Reconsideration is necessary to, at a minimum, apply an actual knowledge standard so that

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[9] *See* Comments of ACA International, CG Docket No. 02-278, at 14-17 (June 6, 2016).

[10] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, FCC Docket No. 07-232, 23 FCC Rcd 559, at ¶ 9 (2008)("ACA Declaratory Ruling"); *see also* 2015 TCPA Order at ¶ 141.

government debt collectors operating in good faith will at least have a potential liability-free pathway for compliance. Without such an actual knowledge standard, covered callers would be subjected to unknown liability risk each time they place a call to a mobile telephone number given the impossibility of knowing for sure that a number has not been reassigned, effectively deterring the very kind of calls Congress sought to encourage through Section 301.

Furthermore, inadvertent calls to a reassigned or wrong number are nevertheless calls made "solely to collect a debt," and are therefore consistent with the statutory text. As Petitioners pointed out, the exemption applies based on the purpose of the call, not the number dialed.[11] This makes sense because federal government debt collectors, like all legitimate debt collectors, have no incentive at all to call a reassigned or wrong number. As such, it is unreasonable to impose an overly stringent rule that undermines the core value of the exemption itself, particularly when there is no additional tangible benefit to be gained.

C. The exemption should cover all federal government debt collection calls whose purpose is "solely to collect a debt," not just calls to the debtor.

ACA agrees with Petitioners that the Commission's prohibition on calls to anyone but the debtor or the person legally responsible for the debt is contrary to the record and Congress's intent. As the record convincingly demonstrated, an inherent part of the debt collection process is being able to locate a debtor through "skiptracing" efforts. Skiptracing is a method used by debt collectors to acquire information related to the location of a consumer. This is particularly important in the student loan context where borrowers often are transient. Excluding such calls – which are made "solely to collect a debt" and for no other reason – is contrary to the text of Section 301 and severely undercuts the effectiveness of the exemption created by Congress. Instead, the

[11] *See* Petition at 15 (stating "Simply put, because the purpose of each one of these calls – regardless of the identity of called party – is "solely to collect a debt," the exemption is triggered."); *see also* Comments of the National Counctil of Higher Education Resources, CG Docket No. 02-278 at 5 (filed Feb. 1, 2017).

Commission should make clear that calls made to third parties solely for the reason of collecting a debt owed to the federal government are covered calls.

D. Covered calls should not be limited to calls made only after a borrower is delinquent.

Despite the fact that Congress made absolutely no mention of the Section 301 exemption being limited to calls made post-delinquency or post-default, the Commission nevertheless improperly limited the exemption for debt collection calls to a period when the debt is delinquent.[12] ACA disagrees with this approach and urges the Commission to reconsider this limitation that is unsupported by the text of the statute.

II. RESPONSE TO CONSUMER GROUPS' OPPOSITION COMMENTS

In response to the Petition, the National Consumer Law Center ("NCLC") and a group of seventeen other organizations jointly submitted comments opposing the Petition for Reconsideration ("NCLC comments" or "consumer groups").[13] Consumers Union, one of those seventeen, also submitted its own letter.[14] While it is clear that these groups have a strong preference for the policy outcomes promoted by the *Order*, their arguments for why the Petition should be denied are unpersuasive.

First, the consumer groups conflate the issue of "unwanted robocalls" with targeted informational calls made using modern technology to collect federal government debt. While the former sweeps in calls from telemarketers and scammers, the latter was specifically identified by Congress as a category of calls for which an exemption from the TCPA's general prior express consent requirement was needed to better effectuate the recovery of outstanding government debt.

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[12] For debt servicing calls, the Commission limited the exemption to a period following a specific, time sensitive event and in the 30 days before such an event. *See Order* at ¶ 34.

[13] Opposition Comments of National Consumer Law Center, CG Docket No. 02-278 (filed February 1, 2017) ("NCLC Comments").

[14] Opposition Comments of Consumers Union, CG Docket No. 02-278 (filed February 1, 2017).

While ACA strongly supports efforts to thwart illegitimate robocalls and hold bad actors accountable, ACA believes common-sense TCPA reform has been needlessly sidetracked because of the broad classification of all autodialed calls as so-called "robocalls." The consumer groups attempt to take advantage of this misleading definitional issue by referring to consumers' desire to avoid robocalls in general as justification for the Commission's very low frequency limitation in this specific proceeding. This misses the mark. The Commission is bound to give effect to clear congressional intent and Congress specifically passed the Bipartisan Budget Act to make it easier for federal government debt collectors to make autodialed calls. Debt collectors have no reason to call consumers on a mobile telephone except to convey or obtain important information. It is imperative that the Commission reconsider the *Order* with that understanding as the backdrop.

Second, in terms of the three-per-month call limitation, NCLC claims that Petitioners "simply don't like the number."[15] The reason this number is not "liked" is because there is plenty of data – data that was abundantly presented to the Commission – that several calls are necessary to establish live contact. Live communication is a necessary precursor to ensuring borrowers receive important account information and that outstanding debts are ultimately resolved. Three call attempts per month, as the record showed, falls far short of what could be considered reasonable to effectuate Congress's intent.

Third, NCLC claims that the rules "are a textbook balancing act by the Federal Communications Commission of the competing goals of the statute: to allow some unconsented-to automated calls to collect federal debt, while protecting call recipients from invasive and costly calls consistent with the purposes of the Telephone Consumer Protection Act."[16] This is flatly false.[17]

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[15] NCLC Comments at 11.

[16] *Id.* at 2.

[17] *See, e.g.*, *Order*, Dissent of Commissioner O'Rielly at 57 (stating, "… the order's outright prohibition on misdialed calls and calls to entities other than the borrower, as well as the effective

Instead of engaging in appropriate regulatory line drawing, the deeply skewed rules make clear that the Commission sought at nearly every turn to pile on so many limitations as to make the new exemption virtually unusable. In fact, in his well-crafted dissent, Commissioner O'Rielly rightfully points out that the Commission's rules were so disconnected from the intent of Congress that federal government debt collection calls would be subject to ***more restrictions*** than other types of calls:

> … it is beyond disappointing that the order decides that the federal government and its contractors will face *more restrictions* when making calls to collect debts than for any other type of call they make. That's the exact opposite of what the Budget Act exemption was designed to accomplish. Clearly, no good law goes unabused in this Commission.[18]

Fourth, NCLC – undoubtedly in an attempt to distract the Commission from the narrow issue at hand – warns that "A single company can make tens of millions of robocalls over the course of a day at a fraction of a penny per call."[19] Although this sentiment is clearly designed to elicit fear, it is not relevant to this narrow proceeding. Legitimate debt collectors, including those who collect federal government debt, contact consumers exclusively for *non-telemarketing purposes*. The calls do not involve advertising or soliciting the sale of products or services. The purpose of these telephone calls is strictly to facilitate individualized, targeted communication. The calls are informational in nature and are never made randomly or sequentially. Congress was aware of this and acted to expressly create an exemption from the TCPA's prior express consent requirements for the specific category of federal government debt collection calls. The Commission must remain focused on its obligation to adopt narrow rules for this purpose and reconsider the rules that impermissibly go beyond it.

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ban on calls to reassigned numbers do not 'balance' the benefits and concerns as the revised order claims. They run counter to the law.").

[18] *Id.* at 55.

[19] NCLC Comments at 9.

Finally, NCLC references consumer complaints made about debt collectors to the CFPB as apparent evidence that federal government debt collectors are not to be trusted with the TCPA exemption that Congress provided to them. To support this, NCLC highlights results from a survey recently released by the CFPB concerning consumers' experiences with debt collectors.[20] What NCLC fails to mention, however, is that the percentage of consumers who have filed *any* complaint with the CFPB about debt collection – regardless of whether those complaints alleged illegal conduct or merely expressed dissatisfaction with the debt collection process – is only one five-thousandth of 1% of all consumers with debts in collections. Moreover, the "findings" from the study that are referenced by NCLC are based on 682 consumers who had interaction with a debt collector in the previous year.[21] This represents ***only one eight-millionth of 1%*** of the approximately 77 million Americans with debts in collections.

Thus, the results of the CFPB's limited survey do not come anywhere close to rising to a level that can be extrapolated across the experience of tens of millions of consumers. In fact, the CFPB itself acknowledged in its report that that none of the findings from the survey are statistically significant.[22] As a result, the Commission should not allow itself to be distracted by sensationalized "findings" and should instead remain focused on reconsidering its rules so that they will be consistent with Congress's clear intent.

III. CONCLUSION

In order to protect the federal government's debt collection efforts from the Commission's untenable TCPA regulations, Congress created an exemption in the Budget Act to allow government

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[20] *Id.* at 19.

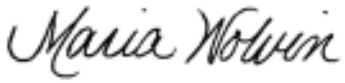
[21] Report, Consumer Financial Protection Bureau, "Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt," at 13 (Jan. 2017) ("CFPB Survey Report") *available at* http://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf.

[22] *See id.* at 12.

debt collectors to more easily contact consumers on their mobile telephones. The exemption Congress created is clear and, as such, the Commission is bound to implement that exemption in a way that provides covered callers the relief that Congress intended.

ACA urges the Commission to carefully consider the comments herein, grant the Petition for Reconsideration, and appropriately revise the rules to ensure they are consistent with the statute, effectuate Congress's intent, and properly reflect the record.

Respectfully submitted,



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February 13, 2017